AC HO SDN BHD

v.

NG KEE SENG

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-04-132 OF 1995]
13 NOVEMBER 1997

ARBITRATION: *Arbitrator - Misconduct - Evaluation of issues - Whether there was omission of issues in reaching verdict - Notice of termination of contract - Whether arbitrator had decided matter based on personal knowledge - Contract for services - Whether payments should be made in lump sum - Whether arbitrator had erred in ordering periodical payments - Whether tantamount to error on face of record - Whether decision could be set aside - Arbitration Act 1952, s. 24(2)*

The appellant had employed the services of the respondent to renovate its factory in Balakong. A difference of opinion eventually emerged between the two and an arbitrator was sought to resolve the dispute. The appellant, however, was displeased with the findings of the arbitrator on the following grounds.

Firstly, it claimed that the arbitrator had failed to consider all the issues raised. Secondly, it argued that the arbitrator had allowed the respondent to unilaterally and unlawfully terminate the service contract when the respondent had no liberty to do so; and that the arbitrator had based this decision on his own knowledge. The basis of the appellant's third contention was that the arbitrator had allowed the payments to be made in a periodical manner when it should have been made in a lump sum.

Held:
Per Mahadev Shankar JCA

[1] On the first allegation, a cursory look at the issues raised in the pleadings and the matters decided in the award indicated that the arbitrator had considered all the issues.

[2] There was no merit in the appellant’s second argument. Evidence adduced showed that it had agreed to abide by the existing rules governing the conduct of architects. The appeal record further indicated that the parties could give notice to terminate of 60 days or any shorter period as might have been agreed.

[3] The appellant's third allegation was equally without merit as evidence showed that periodical payments were part and parcel of the contract.

Per curiam

[1] This matter arose solely as a result of the unsatisfactory conduct of the appellant in being a poor paymaster. Under the circumstances, the respondent had been compelled to seek redress from the arbitration board to recover his fees after all other attempts had failed.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Pihak perayu, iaitu Ho, telah mengupah khidmat pihak responden, iaitu Ng, untuk memperbaiki kilang yang terletak di pekan Balakong. Sejurus kemudian, telah berlaku percanggahan pendapat antara kedua belah pihak tersebut. Hal ini kemudiannya dirujuk kepada seorang penimbangtara untuk mencari jalan penyelesaian kepada masalah itu.

Walaubagaimanapun, pihak perayu tidak berpuas hati dengan keputusan penimbangtara tersebut atas alasan-alasan berikut.

Pertamanya, mendakwa bahawa penimbangtara gagal mengambilkira kesemua isu-isu yang diutarakan oleh beliau. Yang keduanya, penimbangtara dikatakan tidak sepatutnya membenarkan pihak responden untuk membatalkan kontrak servis mereka bilamana pihak responden dikatakan tiada hak mutlak untuk berbuat begitu. Arahan penimbangtara dianggap berpandukan pengetahuannya sendiri dan tidak merujuk kepada fakta-fakta. Alasan ketiga adalah penimbangtara telah membenarkan bayaran dalam bentuk ansuran bilamana ia sepatutnya dibayar sekaligus.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Merujuk kepada alasan pertama, pemerhatian sepintas lalu terhadap isu-isu yang diketengahkan mendapati bahawa penimbangtara telah sebenarnya meneliti segala isu-isu yang diutarakan oleh pihak perayu.

[2] Telah didapati tiada merit dalam alasan kedua pihak perayu. Bukti menunjukkan bahawa beliau telah bersetuju untuk mematuhi peraturan-peraturan yang berkenaan dengan tingkahlaku arkitek. Nota-nota rayuan turut menunjukkan bahawa pihak-pihak yang terlibat dalam kontrak sebegini rupa boleh memberi notis penamatan selama 60 hari atau jangkamasa yang lebih pendek yang dipersetujui oleh mereka.

[3] Alasan ketiga pihak perayu juga tidak berasas disebabkan terdapatnya bukti yang menunjukkan bahawa bayaran ansuran adalah salah satu dari terma-terma yang terkandung dalam kontrak tersebut.

Per curiam

[1] Kes ini hanya wujud disebabkan oleh kelakuan tidak memuaskan pihak perayu kerana tidak menjelaskan hutangnya. Dalam hal ini, pihak perayu telah terpaksa mencari penyelesaian dari pihak timbangtara untuk mendapatkan kos perbelanjaannya apabila cara lain untuk mendapatkannya gagal.

[Rayuan ditolak dengan kos.]

Case referred to:
Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd [1994] 3 CLJ 338 ***(refd)***

Legislation referred to:
Arbitration Act 1952, s. 24(2)
Architects (Amendment) Rules 1986, Fourth Schedule, r. 16

Other source referred to:
Halsbury's Laws of England, 4th edn, vol 2, para 623
Russell On The Law of Arbitration, 1982, 20th edn, p 410

For the appellant - Rajendra Navaratnam (Lim Chong Fong with him); M/s Azman, Davidson & Co
For the respondent - S Selvarajah; M/s Fernandez & Co

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-35-1995]

Reported by Bhawani Mano

JUDGMENT

Mahadev Shankar JCA:

This is an appeal against the order of the High Court judge dismissing the appellant's application to set aside an arbitration award. Our reasons for dismissing the appeal now follow.

The application was brought under s. 24(2) of the Arbitration Act 1952 which reads:

> 24. (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.

In the present case the alleged misconduct in question consisted of allegations that the arbitrator had committed errors of law and fact in the manner in which he proceeded to decide the issues raised before him.

The court's approach in cases like this is well established. Volume 2 of *Halsbury's Laws of England* (4th Edn) para. 623 reads:

> 623. **Error of law on face of award.** An arbitrator's award may be set aside for error of law appearing on the face of it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that there can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.

Russell On The Law Of Arbitration (20th Edn) (1982) at p. 410 reads:

> The arbitrator has in general a discretion as to the manner in which the reference is to be conducted. See *ante,* pp. 253-259, 279. The court will not review the arbitrator's discretion, provided he acts within his authority and according to the principles of justice and behaves fairly to each party. *Mediterranean, etc, Co Ltd v. Fortress Fabrics Ltd* [1958] 2 All ER 186. Thus Cockburn CJ said: "I would observe that we must not be over-ready to set aside awards where the parties have agreed to abide by the decision of a tribunal of their own selection, unless we see that there has been something radically wrong and vicious in the proceeding". *Re Hopper* [1867] LR 2 QB 367.

This passage was adopted and applied by YA Zakaria Yatim in *Lian Hup Manufacturing Co. Sdn. Bhd. v. Unitata Bhd.* [1994] 2 MLJ 51 at p. 55.

The respondent (Ng) is an Architect practising under the style of Konsultant Senicipta. Ng was engaged to provide architectural services for the renovation of a factory at Balakong belonging to a subsidiary of the appellant (Ho). Differences having arisen between them, Ho and Ng got the Lembaga of the Pertubuhan Akitek Malaysia (PAM) to appoint Cheang Kok Cheow (the arbitrator). Cheang was not only a Chartered Architect but also a Fellow of the Chartered Institute of Arbitrators United Kingdom. He was also Chairman of the PAM Arbitration Panel from 1978-1985.

Both Ng and Ho were represented by counsel before the arbitrator. Pleadings and Agreed Bundles of Documents were filed and there was an oral hearing for several days. Encik C.F. Lim also appeared as Ho's counsel before the arbitrator. Lengthy written submissions were also filed.

On 23 February 1995 the arbitrator delivered a nine-page award. 2nd Appeal Record pp. 516-526. In the light of the criticisms made by the appellant's counsel we have read this award with great care. We are unable to see anything radically wrong with it.

Encik C.F. Lim also appeard in the High Court. He was unable to persuade YA Dato' Azmel that there was anything wrong with the award.

Before us Encik Navaratnam appeared for the appellant. This is not the kind of case which calls for a long and learned analysis of everything that was urged for the appellant because we saw hardly any merit in his arguments.

Out of deference to him however we will briefly state why.

Encik Navaratnam's first submission was that the Arbitrator had misconducted himself because he had failed to deal with all the issues raised by Ho. A cursory look at the issues raised in the pleadings and the matters decided in the award will show this not to be the case. Encik Navaratnam was not aware that in the court below Encik C.F. Lim conceded that all issues raised in the pleadings had been considered by the arbitrator. There is no error on the face of the record here.

Encik Navaratnam's next submission was that Ng had unilaterally and unlawfully terminated the contract by giving notice, which he says Ng was not at liberty to do. He complains that the arbitrator imported his own knowledge into the case by holding that it was the custom and practice to give 60 days notice or such lesser period as may be agreed between the parties. The relevant portion of the records reads Appeal Record p. 523:

> A contract between an architect and his client as is the custom and practice under the conditions of engagement sanctioned by the Malaysian Institute of Architects and the Board of Architects provides for termination by either party by the giving of a notice of 60 days or any shorter period that may be agreed to between the parties. (Emphasis added).

There is no merit in this submission. Ng's offer letter dated 30 October 1990 *inter alia* stated Appeal Record p. 147:

> We shall be governed by the Articles of Association, Regulations & Bye-laws and Code of Professional Conduct of Pertubuhan Akitek Malaysia (PAM)

The Architects (Amendment) Rules 1986 P.U.(A) 347 dated 6 August 1986 was in force at all material times. These rules are made under the Architects Act 1987. The Fourth Schedule of the amended principal rules reads:

Termination of engagement

16. The agreement between the architect and the client may be terminated at any time by either party giving to the other party (60) sixty days' notice or such shorter period of notice as may be agreed upon by the architect and the client.

The issue was raised before the arbitrator and Encik C.F. Lim's response in his final written submission was Appeal Record p. 459:

> 1.18 Further, there is no room for the importation and incorporation of the PAM Standard Conditions of Engagement of an Architect because there was never any expressed reference to the same in any document.

He was clearly wrong.

Ng's letter of termination is dated 27 December 1993. Ho's solicitors replied on 7 January 1994 stating "our client accepts the repudiation". The contract was at an end.

The next objection turns on the question of periodical payments. Ho's counsel submitted that this was a lump sum contract. The arbitrator said Appeal Record p. 522:

> Unless a contrary intention is expressed it is the custom and practice in the architectural profession that an architect's fee whether on the basis of a percentage of the cost of the works or on a lump sum basis, the architect would be paid periodically relative to the progress made in providing the services.

Again Ho's counsel complained that the arbitrator imported his own knowledge into the case. But with respect Ng's terms which Ho accepted were *inter alia* Appeal Record p. 148:

> C. Mode of Payment
>
> Payment to us shall be at intervals corresponding to each stage of work completed. Modes of payment at the various stages are as follow:
>
> Upon completion of Stage A : 25% of fee payable
>
> Upon completion of Stage B : 25% of fee payable
>
> Upon completion of Stage C : 25% of fee payable
>
> Upon completion of Stage D : 25% of fee payable
>
> (*This shall be paid in equal monthly payments over the construction period. The final payment shall be adjusted according to final construction cost).
>
> Note: Fees and charges when due shall not be reduced or withheld on event of penalties, Liquidated & Ascertained Damages or sum withheld from payment to contractor.

Periodical payments were part and parcel of this contract.

So far as this appeal goes we could find no grounds whatsoever for interfering. In passing we would add that it is our observation that much of the troubles in this case arose because Ho was a poor paymaster. The fourth interim certificate was issued by Ng on 22 February 1993. It was for RM174,321.37. Ho would not pay the building contractor and the building contractor refused to do any more work. The total value of the contract as on that date was RM1,086,912.25. The balance due to Ng for fees was a paltry sum of RM15,075. Ho would not pay that. On 23 April 1993 Ng resorted to solicitors to send a letter of demand. Ho still would not pay. But Ho wanted Ng to do more work. On 2 June 1993 Ho demanded that Ng should submit amended plans to the Local Authority. By letter dated 8 June 1993 Ng asked Ho to settle the outstanding fees first. He did not. By December 1993 as earlier stated the parties disengaged. It was Ng who initiated the arbitration to recover his fees.

So far as the law is concerned we did not see any merit in this appeal. As for Ho's complaints before the High Court or before us we would add that it is very difficult to feel any sympathy for the plight in which Ho now finds itself. The legal costs in proportion to what Ng claimed must now be enormous.

In dismissing this appeal with costs, we had also ordered that the deposit be paid out to the respondent to account of his taxed costs.